

MANDATE

N.Y.S.D. Case #
83-cv-6346(TPG)

16-3273

Hardy, et al. v. Kaszycki, et al.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of June, two thousand seventeen.

PRESENT: DENNIS JACOBS,
DEBRA ANN LIVINGSTON,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

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M. GUY HARDY, individually and as a participant in the Local 95 Insurance Trust Fund and the Local 95 Pension Fund, and on behalf of all other persons who are, will be, or have at any time since 1/1/80, been participants or beneficiaries in the, JOSEPH HARDY,
Plaintiffs-Appellees,

HARRY J. DIDUCK, HARVEY L. SHERROD,
Plaintiffs,

-v.-

EQUITABLE LIFE ASSURANCE SOCIETY OF
THE UNITED STATES,

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: July 06, 2017

16-3273

Defendant-Cross-Claimant-
Appellee,

WILLIAM KASZYCKI, TRUMP-EQUITABLE
FIFTH AVENUE COMPANY, TRUMP
ORGANIZATION, HOUSE WRECKERS UNION
LOCAL 95 PENSION FUND, TRUSTEES OF THE
HOUSE WRECKERS UNION LOCAL 95
INSURANCE TRUST FUND, KASZYCKI & SONS
CONTRACTORS INC., DONALD J. TRUMP, DBA
THE TRUMP ORGANIZATION, JOHN SENYSHYN,

Defendants-Cross-Defendants-
Cross-Claimants-Appellees,

-v.-

TIME INC., THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS,
Intervenors-Appellants.

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FOR APPELLANTS:

KATIE TOWNSEND, The Reporters
Committee for Freedom of the
Press (Bruce D. Brown, on the
brief), Washington, D.C.

Andrew B. Lachow, Time Inc., New
York, New York.

FOR APPELLEES:

MATTHEW R. MARON, The Trump
Organization, New York, New
York.

Jared E. Blumetti, Lawrence S.
Rosen, LaRocca Hornik Rosen
Greenberg & Blaha, LLP, New
York, New York.

Appeal from order of the United States District Court
for the Southern District of New York (Griesa, J.).

1 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
2 **AND DECREED** that the order of the district court be **VACATED**
3 and **REMANDED**.

4 Intervenors Time, Inc. ("Time") and The Reporters
5 Committee for Freedom of the Press appeal from the order of
6 the United States District Court for the Southern District
7 of New York (Griesa, J.) denying their request to unseal
8 several documents on the docket. We assume the parties'
9 familiarity with the underlying facts, the procedural
10 history, and the issues presented for review. We vacate the
11 order of the district court and remand so it can balance the
12 presumptions of public access to court documents against
13 countervailing interests.

14 In 1983, a member of a demolition-workers union filed a
15 class action against various parties involved in demolishing
16 the Bonwit Teller building, which was torn down to build
17 Trump Tower. In 1998, the class members settled with the
18 various defendants, and the district court approved the
19 settlement. The court sealed four documents on its docket
20 connected with that settlement: 1) a transcript of an
21 October 26, 1998 conference (dkt. no. 409); 2) a plaintiffs'
22 brief filed on November 9, 1998 (dkt. no. 410); 3) a
23 district court order approving the settlement dated December
24 30, 1998 (dkt. no. 411); and 4) another district court order

1 approving the settlement dated February 9, 1999 (dkt. no.
2 412). In 2016, Time and The Reporters Committee for Freedom
3 of the Press moved to unseal those four documents. The
4 district court denied their motion, and this appeal
5 followed.

6 Two of the documents the press organizations seek--the
7 transcript and the brief--have been destroyed pursuant to
8 the Southern District of New York's standard document
9 retention policies. We therefore refrain from ruling on the
10 unsealing request as it pertains to them. See Independence
11 Party of Richmond Cty. v. Graham, 413 F.3d 252, 255-56 (2d
12 Cir. 2005).

13 The Southern District still has the two sealed court
14 orders, however, so we may review the decision on whether
15 they should remain sealed. Both the common law and the
16 First Amendment create presumptions that certain types of
17 documents should be publicly available. Lugosch v. Pyramid
18 Co. of Onondaga, 435 F.3d 110, 119-20 (2d Cir. 2006). Both
19 apply to the two court orders, but the presumptions of
20 access are simply presumptions--they do not automatically
21 mean that the documents should be unsealed. We remand this
22 case to the district court for a determination as to whether
23 countervailing interests overcome the two presumptions.

1 The common law presumption of access attaches to
2 “judicial documents,” and judicial documents are those that
3 are “relevant to the performance of the judicial function
4 and useful in the judicial process.” Id. at 119. It is
5 settled that the court-authored orders in this case are
6 judicial documents, and that the common law presumption
7 therefore attaches. In re Application of the United States
8 for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d
9 283, 290 (4th Cir. 2013) (“[I]t is commonsensical that
10 judicially authored or created documents are judicial
11 records.”); EEOC v. Nat’l Children’s Ctr., Inc., 98 F.3d
12 1406, 1409 (D.C. Cir. 1996) (“A court’s decrees, its
13 judgments, its orders, are the quintessential business of
14 the public’s institutions.”).

15 The next analytical step is to determine the strength
16 of the presumption as it applies to these documents.
17 Lugosch, 435 F.3d at 119. We conclude that it is of
18 middling strength. The two documents are closely tied to
19 the exercise of judicial power (they are the exercise of
20 judicial power), but the very strongest presumption is
21 reserved in civil cases for documents “used to determine
22 litigants’ substantive legal rights.” Bernstein v.
23 Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 142
24 (2d Cir. 2016).

1 Courts have found that interests such as protection of
2 ongoing investigations, safety of witnesses, national
3 security, and trade secrets may be sufficient to defeat the
4 presumption. Id. at 143. We leave it to the district court
5 to identify any interest in favor of secrecy sufficient to
6 defeat the presumption that court orders be open to the
7 public.

8 The First Amendment also creates a presumption of
9 public access that likewise attaches to court orders. There
10 is a long tradition of public access to court orders, Union
11 Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir.
12 2000) ("[I]t should go without saying that the judge's
13 opinions and orders belong in the public domain."); they are
14 judicial documents, Lugosch, 435 F.3d at 120 ("The courts
15 that have undertaken this type of [First Amendment] inquiry
16 have generally invoked the common law right of access to
17 judicial documents in support of finding a history of
18 openness."); and public access plays a significant role in
19 the judicial approval of class action and derivative
20 settlements. But the First Amendment presumption, like the
21 common law presumption, may be overcome by competing values.
22 Lugosch, 435 F.3d at 120.

1 On remand, the district court shall consider whether
2 any interests can overcome the common law and First
3 Amendment presumptions of access to the two court orders.
4 Any decision that the documents should remain sealed must be
5 supported by "specific, on the record findings" and must
6 explain why sealing "is essential to preserve higher values
7 and is narrowly tailored to serve that interest." Id.

8 For the foregoing reasons, we hereby **VACATE** the order
9 of the district court and **REMAND** for further proceedings
10 consistent with this order.
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FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

A circular official seal of the United States Court of Appeals, Second Circuit, is stamped over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

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